

**IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS**

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6/8/2016
ABEL ACOSTA, CLERK

EX PARTE)	Writ No. _____
)	(Trial Court Cause No. 26,162)
)	
Robert Roberson,)	CAPITAL CASE
)	
APPLICANT)	
)	EXECUTION DATE:
)	June 21, 2016

MOTION FOR STAY OF EXECUTION

Robert Roberson, through counsel, respectfully moves this Court for a stay of his execution, currently scheduled for June 21, 2016, in light of the need for further proceedings regarding the subsequent application pursuant to Article 11.071(5) and 11.073 of the Texas Code of Criminal Procedure filed today in both the Court of Criminal Appeals and the convicting court. Mr. Roberson files this motion to allow for full and fair consideration of his four important claims as follows:

1. New scientific evidence establishes by a preponderance of the evidence under Article 11.073 that Robert Roberson would not have been convicted.
2. Because the State relied on false, misleading, and scientifically invalid testimony, Robert Roberson's right to due process under *Ex parte Chabot* and *Ex parte Chavez* was violated.
3. Robert Roberson is entitled to habeas relief under *Herrera v. Collins* and *Ex parte Elizondo* because he is innocent of capital murder.

4. Robert Roberson is entitled to habeas relief because his due process right to a fundamentally fair trial was violated by the State's introduction of false forensic science testimony that current science has exposed as false.

These four distinct constitutional and statutory claims for relief are based on newly available scientific evidence proffered through the affidavits and declarations of three different eminent forensic pathologists, Dr. Harry J. Bonnell, M.D., Janice J. Ophoven, M.D., and John Plunkett, M.D., as well as a leading biomechanical engineer, Dr. Ken. L. Monson, Ph.D. with specialized expertise in brain injuries. These experts, three of whom have previously been found credible, truth, and helpful in resolving a similar case before this Court,¹ are in unanimous agreement: the State's theory of homicide is unsupported by contemporary medicine or biomechanics. Each of the four claims raised in the subsequent application entitles Robert Roberson to a new trial.

If this Court is not ready to authorize the case under section 5 because of the complexity of the scientific and constitutional issues raised, it should stay the case to allow time for a fair adjudication of these substantive claims.

BASIS FOR THE STAY

¹ See *Ex parte Henderson*, 384 S.W.3d 833, 847 (Tex. Crim. App. 2012) (remanding for new trial in a child death case where new developments in the science of biomechanics made it impossible to determine with "a reasonable degree of medical certainty whether [the decedent's] injuries resulted from an intentional act of abuse or an accidental fall").

Robert Roberson was wrongfully convicted of murdering his two-and-a-half year-old daughter—based on junk science and highly inflammatory sexual-abuse allegations that were false.

This Court is already aware of a sea change in the medical consensus since Robert’s trial commenced in September 2002 regarding the phenomenon known as “Shaken Baby Syndrome” (SBS) aka “Abusive Head Trauma” (AHT). *See, e.g., Ex parte Henderson*, 384 S.W.3d 833, 833-34 (Tex. Crim. App. 2012) (remanding for new trial where new developments in the science of biomechanics led the medical examiner who had testified at trial to attest that he now believes “there is no way to determine with a reasonable degree of medical certainty whether [the decedent’s] injuries resulted from an intentional act of abuse or an accidental fall”); *Ex parte Vasquez*, WR-59,201-03, 2012 WL 225539 (Tex. Crim. App. Mar. 23, 2016) (granting stay and later remanding for trial court to review the merits of claims that, *inter alia*, new scientific evidence regarding cause of death of four-year-old contradicted evidence the State relied on at trial); *cf. Ex parte Robbins*, 478 S.W.3d 678 (Tex. Crim. App. 2014) (finding male caretaker convicted of capital murder of a child was entitled to habeas relief based on new science that was not available at the time of trial).²

² The Texas Legislature was motivated to enact Article 11.073 in part to address concerns about the scientific integrity of criminal convictions raised in cases like *Ex parte Robbins*, 478 S.W.3d 678, 695-696 (Tex. Crim. App. 2014), reh’g denied sub

The prior medical understanding was that a specific set of symptoms could be viewed together as virtually categorical proof that a child's injuries could be attributed to SBS/AHT. More specifically, in 2002-2003, when Robert was tried, the medical community invited doctors to infer conclusively that a child had been violently shaken from the presence of three symptoms: retinal hemorrhaging, subdural hematoma/hemorrhaging, and edema or brain swelling. The assumption was that, where this "triad" of symptoms was present, a child *must* have been the victim of intentionally inflicted abuse and that whoever had been caring for that child when the symptoms became manifest *must* have been the culprit—absent some verified major trauma such as a car wreck or a fall from a multistory building. But now, that diagnostic approach is viewed as spurious.

The tragic death of Nikki Curtis (Nikki) was deemed capital murder through reliance on junk science and a rush-to-judgment engendered by pronounced cognitive bias on the part of medical personnel. By relying on the testimony of those who had presupposed from the outset that Nikki must have been the victim of child abuse perpetrated by the father who brought her to the hospital, the State—and even defense counsel—accepted that the only possible explanation for this child's death was SBS/AHT. Instead of taking Robert's explanation about a fall seriously or

nom. *Ex parte Robbins*, WR-73,484-02, 2016 WL 370157 (Tex. Crim. App. Jan. 27, 2016) (J. Cochran, concurring).

exploring all possible causes of the injury sustained by a chronically ill child who had been at the doctor's office with 104.5-degree temperature only two days before, a tragedy was hastily deemed a crime and a father, doing the best he could to care for his daughter despite severe cognitive impairments, was branded a murderer.

The new evidence, provided in Exhibits attached to Robert's concurrently filed application, establishes that:

- The triad of symptoms once seen as a medical diagnosis of murder, labeled "Shaken Baby Syndrome" and then later renamed "Abusive Head Trauma," is now understood as a phenomenon that can be caused by multiple other conditions—including some of the very health issues found, but ignored, in Nikki's medical profile.
- It is impossible to shake a toddler to death without causing serious neck injuries—and Nikki had none.
- Short falls can cause serious, even fatal, head injuries in children—yet Robert's report that Nikki had sustained such a fall was summarily dismissed by the medical professionals who testified at trial.
- Children presenting with the kind of serious brain injury found in Nikki can have an extended "lucid interval," even of several days, before their condition becomes apparent—yet SBS/AHT is based on the hypothesis that whoever was with the child when their condition became apparent must have inflicted that injury absent evidence of a massive car crash or fall from a multi-story building.

The current scientific consensus also rejects the notion that SBS can be used as an exclusionary diagnosis; research, testing, and new discoveries have unearthed a slew of alternative causes of the triad, from undetected congenital defects to contracted illnesses. No alternative causation theory was presented to the jury at

Robert's trial.

The current scientific paradigm not only debunks the State's SBS theory; it also shows that, contrary to the testimony of medical professionals at Robert's trial, Nikki's condition could have been caused by multiple other circumstances—all of which exculpate Robert:

First, Nikki's symptoms and death may have been caused by undiagnosed meningitis due to a middle ear infection (which is now known to cause intracerebral bleed from central vein or sagittal sinus thrombosis). This possibility is amply supported by her medical history and records.

Second, Nikki's symptoms and death may have been caused by an intentional or accidental head injury sustained before Robert took custody of her after 9:30 PM on January 30, 2012—the night before he found her unresponsive a few hours after she had fallen off a bed. Such an injury could have produced the internal subdural hematoma that continued to develop during the time when she was in his custody and ultimately led to her collapse. Robert would have had no reason to notice the internal injury, as it was concealed until her head was shaved the next morning at the hospital. But no one ever considered the prospect of attributing any responsibility to the individuals who had Nikki in custody up until 9:30 PM although they, inexplicably, urged Robert to take charge of Nikki late that evening when she was still sick from a week-long infection and although they had been repeatedly

investigated by CPS as a result of head injuries and choking instances that had sent Nikki to the ER well before Robert entered her life.

Third, Nikki's symptoms and death may have been caused by the fall from the height of approximately two-feet that Robert reported but did not witness. The specifics of that fall were not sufficiently documented because law enforcement discounted the idea from the outset that a short-distance fall had the potential to severely injury a child.

Fourth, Nikki's symptoms and death may have been caused by a congenital condition, reflected in her high-risk birth and her long-standing health issues, that made her prone to increased cranial pressure, coagulation abnormalities, chest compressions, hypoxia (or oxygen deprivation)—all of which, the medical records show, were actually present in Nikki's case and all of which are now known causes of retinal hemorrhages, which the State's medical experts presumed could only be attributed to SBS/AHT.

See Exhibit A at ¶7; Exhibit B at p. 16; Exhibit C at ¶19.

One thing is certain, however: Nikki's death was *not* caused by shaking. Exhibit D at ¶18-20.

If presented with these multiple, legitimate, uninvestigated potential causes of Nikki's death, no reasonable juror would have found the State's SBS/AHT theory probative, let alone dispositive. No reasonable juror would have a basis to conclude

beyond a reasonable doubt that the prosecution had proven a homicide, much less that Robert committed a homicide. Therefore, reasonable jurors would have rejected the causation testimony offered by the local Palestine medical personnel as well as the prosecution child abuse expert and the medical examiner who testified at trial that SBS/AHT caused Nikki's death.

In addition to scientific evidence that the current scientific paradigm rejects, the State persistently referred to a false and inflammatory allegation that Robert had sexually assaulted Nikki—although the State's own medical experts found no evidence to corroborate that hypothesis. The specter of sexual abuse was raised with every venire member and with almost every witness at trial. Before the close of evidence in the guilt phase of the trial, the State moved to drop the sexual abuse allegation contained in the indictment. 41RR3. But by then, the damage had been done. The State had knowingly used false testimony from an inexperienced local nurse whose self-appointed job was to seek out evidence of sexual abuse.³ Although this nurse's speculation was later rejected by the medical examiner and the State's other medical experts, the State used this rank speculation to drive home its view that Robert was not just a poor, mentally impaired father struggling with sobriety,

³ After identifying herself as a "Sexual Assault Nurse Examiner" or "SANE" nurse on direct examination, Andrea Sims admitted during cross examination that she was *not* in fact certified. 41RR144.

but a deviant—capable of raping and brutally shaking his own daughter to death.

This application for relief is being filed at this juncture because he only recently obtained conflict-free federal habeas counsel who referred the junk science issue to the Office of Capital and Forensic Writs to investigate. Undersigned counsel diligently investigated, amassed substantial evidence to support four meritorious claims, and have filed a subsequent habeas application under Article 11.073 as soon as practicable.

The Court must now review the application filed in conjunction with this motion for a stay and determine whether Robert Roberson has made a *prima facie* showing that he is entitled to relief based on one or more of this claims that: new scientific evidence establishes by a preponderance of the evidence under Article 11.073 that he would not have been convicted; that the State relied on false, misleading, and scientifically invalid testimony to obtain his conviction; that he is actually innocent of capital murder; and/or that his due process right to a fundamentally fair trial was violated by the State's introduction of false forensic science testimony that current science rejects. Robert is entitled to relief on each of these grounds.

CONCLUSION

Given the urgency and complexity of this case, Robert Roberson respectfully asks that this Court to stay his execution pending the resolution of the

complex issues before it.

Respectfully submitted,

/s/ Benjamin B. Wolff

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CERTIFICATE OF COMPLIANCE

This pleading complies with Tex. R. App. P. 9.4. According to the word count function of the computer program used to prepare the document, the brief contains 2,096 words excluding the items not to be included within the word count limit.

/s/ Gretchen S. Sween
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CERTIFICATE OF SERVICE

I, the undersigned, declare and certify that I have served the foregoing Motion for Stay of Execution on:

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This certification is executed on June 8, 2016, at Austin, Texas.

/s/ Gretchen S. Sween
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